No. 353.

Brf. of Harmon & Bowman for Appe

FILED
JAN 9 1899
JAMES H. McKENNEY,
Clerk

The Robert Clarke Company, Printers, Cincinnati. [January, 1899.

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Supreme Court of the United States.

OCTOBER TERM, 1898.

The State of Ohio,

Appellant.

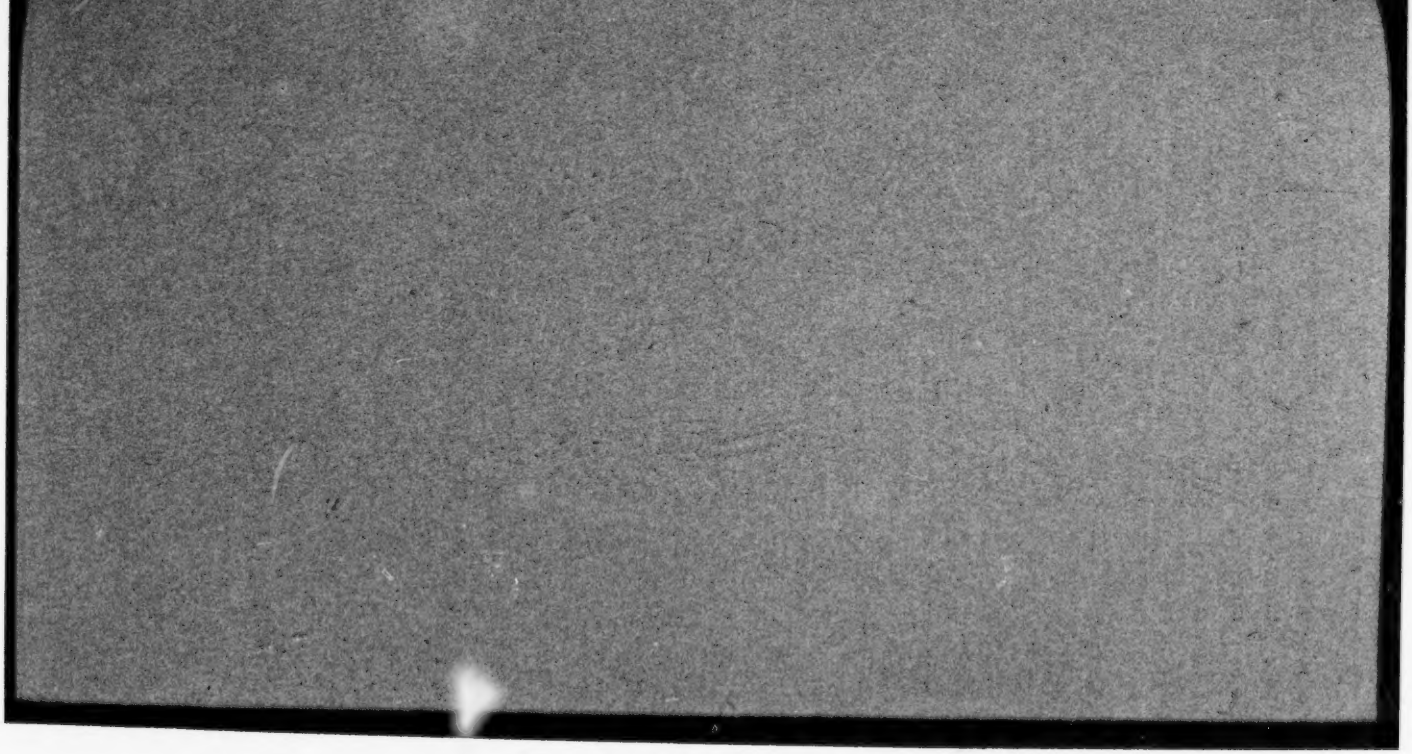
No. 353.] *vs.*

J. B. Thomas.

On Appeal from the Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR APPELLEE.

JUDSON HARMON,
D. W. BOWMAN.



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STATEMENT.

The appellee was arrested and brought before a justice of the peace of Montgomery County, Ohio, on a charge of violating the statute of Ohio, which requires every "person in charge of any hotel . . . or eating house, etc., who therein sells, uses, serves, furnishes or disposes of, or uses in cooking, any oleomargarine," to display a placard announcing such fact. (92 O. L. p. 23. Rec. 9.)

He declined to plead to the charge, and moved its dismissal for want of jurisdiction, "because the acts done by him, referred to in the affidavit filed herein, were done solely as Governor of the Central Branch of the National Home for Disabled Volunteer Soldiers, under and by virtue of the

laws of the United States, and by authority of the Board of Managers of said National Home, on the grounds belonging to the United States, and used and occupied for the purposes of said Home, and with respect to the inmates of said Home only." (Rec. 10.) The justice overruled the motion, whereupon he was tried, convicted and sentenced to a fine, and to stand committed and held a prisoner until the fine and costs were paid.

The facts were agreed (Rec. 11). They show that the statements upon which he moved the dismissal were true, and that no placard was displayed, as required by the statute of Ohio.

Upon his conviction and committal, he sued out a writ of *habeas corpus* before Honorable William H. Taft in the Circuit Court of the United States for the Southern District of Ohio, who, upon hearing, discharged him from custody. (See his opinion, Rec. 16.) The Circuit Court of Appeals, on error, affirmed this judgment. (See opinion, Rec. 26.)

The "eating-house" mentioned in the affidavit is admitted to have been the "mess-room" of the Soldiers' Home at Dayton, "situate on the grounds purchased, held and used by the United States," for the purposes of such Home; that what the petitioner did was to cause oleomargarine to be served and furnished "as food and as part of the rations furnished to the inmates thereof under appropriations made by the Congress of the United States for the support of said inmates." (Rec. 11.)

If this mess-room is one of the places covered by the language of the statute of Ohio, and if the petitioner was the "manager or person in charge of" the same within its intent and meaning, then it is admitted that, as he did not comply with the requirements of that statute, he was properly convicted if he was amenable to the State law.

The only questions are:

1. Do the terms of that statute include the petitioner and such mess-room?

2. If they do, was he triable under that statute in the State court for acts done by him as a Federal officer in the conduct of an institution committed to his charge by the laws of the United States?

ARGUMENT.

We maintain:

1. That the terms of the statute do not include the person or the place in question, apart from their Federal character.

2. If they do, the statute must be held not intended to apply to the petitioner; and, even it so intended, it can not be enforced against him by the courts of Ohio.

I.

The language of the statute was plainly meant to include only such establishments as are conducted, directly or indirectly, for gain. The enumeration is of such places only, and, while the words "uses, serves, furnishes, or disposes of," etc., might seem, at first glance, intended to cover other than commercial disposal of oleomargarine, they clearly appear, looking at the entire statute and at the subject in hand, to be meant only to prevent evasions by indirection on the part of commercial users, as in the liquor laws. Thus, a merchant who maintains a lunch-room for customers, although he makes no direct charge for what is furnished them, might be said to come under the statute. But we find nothing in the statute which indicates an intention to make it apply to purely public or to benevolent institutions of any kind.

The evident assumption of the statute is that the patrons of the establishments it covers have a choice whether they

will come to them or not, and whether, if they come, they will use oleomargarine or not. To enable them to make this choice, they must be advised by a placard. Where, however, they have no choice, but, as inmates, must accept whatever the bounty of the maintainer of the institution provides, the statute does not apply.

II.

The purely Federal character of this institution is distinctly recognized by the Supreme Court of Ohio, in *Driggs* v. *State*, 52 O. S. 53:

"The independent management of the National Home at Dayton through agents of the United States . . . the fact that all the inmates are made subject to the rules and articles of war the same as if they were in the army," etc.

Assuming, however, for present purposes, that the terms of the statute would otherwise apply, it must be presumed that it was not the intention of the Legislature of Ohio to attempt to interfere with the management by the Federal government of an institution founded and carried on by it as one of its direct agencies for the execution of its legitimate purposes. (See *Renner* v. *Bennett*, 21 Ohio St. 431.) If, however, such intention in fact existed, the attempt to carry it out must fail.

The question is not whether, in view of the cession by Ohio of full jurisdiction over the territory occupied by the Home, and the at least partial retrocession of jurisdiction by Congress, the State may arrest and prosecute persons generally who violate her laws thereon. We do not care now to consider the authority of Congress to divest the United States of full jurisdiction over territory once acquired for Federal pnrposes which have not been abandoned thereon, and shall assume that the State has now the rights which the

act of retrocession purported to restore. But this assumption leaves the real question undetermined.

If the State had no jurisdiction whatever over the territory, this case would never have arisen. Having general jurisdiction, so that it may punish individuals who therein break its laws, does not determine whether it has the right to punish a Federal officer for acts directly done in the discharge of his duty under the laws of Congress, because he has failed to comply with the law of the State which regulates like conduct by others.

The original grant of jurisdiction by the State reserved the right to execute civil or criminal process "on said lands and in the buildings which may be located thereon, in the same way and manner as if jurisdiction had not been ceded as aforesaid." (64 Ohio L. 149.) The act of retrocession provided "that nothing contained in this act shall be construed to impair the powers and rights heretofore conferred upon the board of managers, etc., in and over said territory." (16 Stats. 399.) We do not see, therefore, how the question of general territorial jurisdiction affects the case. It depends entirely on the nature of the act for which the petitioner was prosecuted, and the place where it was done is of no consequence save in so far as it tends to show the nature of the act.

If the petitioner had, in the Home, done something which was not connected with his official duty and violated the State law, it might be conceded without affecting the case that he could be prosecuted by the State. But it is admitted that the act he did was in the direct discharge of his duty. So we contend that no law of Ohio can regulate the official conduct of a Federal officer, and the courts of the State have no jurisdiction to punish him for an alleged violation of its laws by such an act. The State has police power, it is true, but not over Federal officers while engaged in the performance of their duties. It may regulate the storage of

gunpowder, but could it do so in a camp or station occupied by Federal troops, even in time of peace? It may require a state diploma for the practice of surgery, but could it punish an army surgeon for practicing among the soldiers without such diploma?

This principle is essential to the sovereignty of the Federal Government within the sphere assigned to it. No government can properly be called such which does not have and maintain at all times and in all ways the sole control of its officers while engaged in the performance of the duties intrusted to them.

This principle does not depend on the place where the officer performs his duty. Wherever he goes, in its discharge, is the United States of America. The Federal and State governments exist together, in and over the same territory. Each fills entirely with its sovereignty the limits of that territory, but each, within the sphere of governmental function intrusted to it, entirely excludes the other; otherwise there could be no *imperium in imperio.*

The principle appears to us to be not only carried by its mere statement, but also to be established by abundant authority.

We will not take time to mention the many cases in which it has been held that the states may not, without the consent of Congress, tax *quasi* private institutions chartered by the United States and adopted by it as instrumentalities of the Government, such as banks in *McCullough* v. *Maryland*, 4 Wheat. 361; *Osborne* v. *United States Bank*, 7 Wheat. 738; *Davis* v. *Elmira Savings Bank*, 161 U. S. 283; *McClellan* v. *Chipman*, 164 U. S. 357; or telegraph companies in *Leloup* v. *Port of Mobile*, 127 U. S. 641. In this class of cases, the agencies, not being purely governmental, are in some respects, in their private aspect, subject to state laws.

When, however, the officer or agency is strictly public—an arm or hand of the Federal government and nothing

else—there can be no qualification of the sovereignty behind him. The subject is fully discussed and this rule established in *In re Neagle*, 135 U. S. 1.

The principle has been enforced by Judge Shiras since this case was decided. (See *In re Waite*, 81 Fed. 359.) Judges Shiras and Taft, as the dates of their decisions show, reached the same conclusion independently.

The various authorities on the subject are cited in the two cases last above named, and in Judge Taft's opinion, and we deem it unnecessary to refer to them in detail.

We know of no case in which the Federal courts have permitted a Federal officer to be held and punished by a state court for an act alleged to be in violation of a state law but done in the discharge of his duty. In *In re Neagle*, the State was prosecuting a deputy marshal on a charge of murder. In *In re Waite*, the State was prosecuting a pension examiner for an alleged violation of a statute of Iowa for the punishment of threats. In *Tennessee* v. *Davis*, 100 U. S. 257, the State was prosecuting a deputy collector of internal revenue for murder. There was no doubt of the territorial jurisdiction of the State in any of these cases, but in each the right of the State to inquire into the conduct of the officer in the discharge of his duty was denied.

Counsel admit (Brief, p. 7) that the appropriation by Congress for the support of the Home is made on itemized statements required by law, which of course include oleomargarine. The fact that this item is not mentioned in the appropriation bill is immaterial. Even if Congress left the selection of rations entirely to the Board, or to the Governor, the case would be the same. The analogy of the interstate commerce cases applies. Congress has the sole right to regulate commerce. If it does not act at all, it means that commerce shall be free. (*Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 204.) It has the right to give directions to its officers. If it does not do so they are left to use their own dis-

cretion. Congress alone may prevent or punish an abuse of such discretion.

The propriety of the remedy by *habeas corpus* has not been questioned. If it should be, it is fully settled by the above cases. The right of a private citizen, who complains that he is being deprived of a Federal right by State prosecution, rests within the discretion of the court. *Cook* v. *Hart*, 146 U. S., pp. 194, 195; *Ex parte* Royall, 117 U. S. 251; *In re* Loney, 134 U. S. 377; *New York* v. *Eno*, 155 U. S. 96; *Whitten* v. *Tomlinson*, 160 U. S. 241. The court may leave the petitioner in such cases to his remedy by writ of error to the Supreme Court of the United States, after the final action of the state courts, or it may grant the writ at once. The circumstances which determine the exercise of the discretion are discussed in the above cases.

But when a Federal officer applies for the writ, and it appears that the prosecution against him is based solely on an act done in the discharge of his duty, it is always granted. *In re* Neagle, pp. 54, 58, 61, 71, 72, 73, 94; *Tennessee* v. *Davis*, 262.

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

JUDSON HARMON,

D. W. BOWMAN,

For Appellee.

CINCINNATI, *December* 28, 1898.